(6)

No. 92-359

Supreme Court, U.S.
FILED
OCT 1 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

—v.—

LEONARD ADAMS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

STUART E. RICKERSON
Vice President–
General Counsel
Keene Corporation
200 Park Avenue
New York, New York 10166
(212) 557-1900

ANDREW T. BERRY
Counsel of Record
GITA F. ROTHSCHILD
MCCARTER & ENGLISH
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(201) 622-4444

Attorneys for Petitioner, Keene Corporation

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

RULES INVOLVED 1

ARGUMENT 2

CONCLUSION 8

SUPPLEMENTAL APPENDIX Sa1

TABLE OF AUTHORITIES

Cases: **Page**

In re Asbestos Products Liability Litigation (No. VI), 771 F. Supp. 415 (Jud. Pan. Mult. Lit. 1991) 3

Dunn v. Hovic, et al., No. 91-3837 (3d Cir. September 18, 1992) . . . . *passim*

Pacific Mutual Life Ins. Co. v. Haslip, ___ U.S. ___, 111 S.Ct. 1032 (1991) 4, 6

Miscellaneous Authorities:

Report of the Judicial Ad Hoc Committee on Asbestos Litigation, (March, 1991) . . . 4

RULES INVOLVED

Petitioner Keene Corporation ("Keene") submits this Supplemental Brief under Supreme Court Rule 15, to call to this Court's attention new case law not available at the time of Keene's previous filings.

ARGUMENT

On September 18, 1992, Hon. Joseph F. Weis, Jr., of the Third Circuit Court of Appeals, joined the growing ranks of jurists and legal scholars calling for an end to punitive damages awards in asbestos cases by declaring:

> [P]arochial concerns... have influenced some states to allow punitive damages.... But it is time that some jurisdiction faces up to the realities of the situation and takes a step that might, perhaps, lead others to adopt a broader view. Courts should not wait any longer for congressional and legislative action to correct common law mistakes made by the courts. Errors created by courts can be corrected by courts without engaging in judicial activism.

Dunn v. Hovic, et al., No. 91-3837 (3d Cir. September 18, 1992) (appended

hereto), slip op. at 65 (Sa122-23) (Weis, J., dissenting).[1]

Unfortunately, the two judges representing the majority in Dunn chose instead the well-worn path of declining responsibility or authority to correct the well-recognized "asbestos mess."[2] Although the majority agreed that repetitive punitive damages awards in asbestos cases raise serious practical and constitutional concerns, it refused to act on those concerns under the misguided belief that it was not the "appropriate forum" for such relief. Id. at 47-48 (Sa89, Sa92).

---

[1] Dunn involved a $25 million punitive damages verdict (remitted to $2 million and further remitted to $1 million) assessed against Owens-Corning Fiberglas Corp. in a single plaintiff asbestos personal injury case.

[2] In re Asbestos Products Liability Litigation (No. VI), 771 F.Supp. 415, 424 (Jud. Pan. Mult. Lit. 1991)

There is no question that this Court is the "appropriate forum" to begin to address this "disaster of major proportions." Report of the Judicial Ad Hoc Committee on Asbestos Litigation, at 2 (March, 1991).

Under this Court's opinion in Pacific Mutual Life Ins. Co. v. Haslip, ___ U.S. ___ 111 S.Ct. 1032 (1991), the Dunn majority correctly held that punitive damages awards must be no "'greater than reasonably necessary to punish and deter.'" Dunn, slip op. at 45 (Sa86) citing Haslip, 111 S. Ct. at 1046. More importantly, the Dunn court recognized that a constitutionally necessary part of this analysis in asbestos cases must include broader "consider[ation of] the effect of successive punitive damages awards in mass tort cases arising from the same

course of conduct." Slip op. at 45 (Sa86).

Judge Weis decried the majority's failure to strike all punitive damages in asbestos cases. Noting that "[t]he number of claims and bankruptcy filings have created the likelihood that future claimants will not be able to recover for their injuries," Judge Weis declared: "It is time - perhaps past due - to stop the hemorrhaging so as to protect future claimants." Id. at 56, 61 (Sa105, Sa116).

Judge Weis recognized that the traditional rationales for punitive damages no longer support these awards in asbestos cases.

> [T]he avalanche of compensatory claims against asbestos manufacturers... has surely served as more of a punishment and deterrent than individual punitive assessments in isolated cases

> against manufacturers of products in other fields.
>
> * * *
>
> Under current conditions, it is fanciful to believe that punishment and deterrence are factors worthy of consideration in assessing priorities to limited funds. Here, punitive damages should not be recovered because their purposes are not being served and their benefits are outweighed by their costs to society.

Id. at 64-66 (Sa122-25).

In short, Judge Weis wrote: "[T]he stark reality [is] that unless something is done now the formerly 'deep pocket' will soon be empty." Id. at 64 (Sa122).

The Dunn majority recognized that Haslip requires reviewing courts in asbestos cases to examine punitive damages verdicts, alone and in conjunction with the current state of the asbestos litigation nationwide. The absence of this constitutionally mandated review procedure in these cases violates

Keene's due process rights and necessitates reversal of the punitive damages awards. In addition, Keene urges this Court to follow the sound reasoning of the Dunn dissent and strike punitive damages from these and all asbestos cases.

CONCLUSION

For the foregoing reasons, as well as those expressed in Keene's initial Petition and Reply Brief, Keene Corporation's petition for certiorari should be granted.

Respectfully submitted,

Andrew T. Berry
Counsel of Record
Gita F. Rothschild
McCarter & English
Four Gateway Center
100 Mulberry Street
Newark, N.J. 07102
(201) 622-4444
Attorneys for Petitioner, Keene Corporation

Of Counsel:

Stuart E. Rickerson
Vice-President -
General Counsel
Keene Corporation
200 Park Avenue
New York, N.Y. 10166
(212) 557-1900

DATED: September 30, 1992

SUPPLEMENTAL APPENDIX

Sa1

Filed September 18, 1992

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 91-3837

WILLIAM DUNN

HESS OIL VIRGIN ISLANDS CORP.

v.

HOVIC; AMERADA HESS CORP.; KEENE

CORPORATION

v.

THE LITWIN CORPORATION; LITWIN

PANAMERICAN; BORINQUEN INSULATION CO.

Owens-Corning Fiberglas Corporation,

Appellant

On Appeal from the

District Court for the Virgin Islands

(St. Croix) (D.C. Civil No. 87-00238)

Argued April 22, 1992

Before: SLOVITER, *Chief Judge*, MANSMANN and WEISS, *Circuit Judges*

(Opinion filed: September 18, 1992)

Barry S. Simon (Argued)
Paul Mogin
Williams & Connolly
Washington, D.C. 20006
Attorneys for Appellant

Joel H. Holt (Argued)
Christianstead, VI 00820
Paul S. Minor
Minor & Guice
Biloxi, Mississippi 39533
Attorney for Appellee

OPINION OF THE COURT

SLOVITER, *Chief Judge*

Owens-Corning Fiberglas Corporation (OCF) appeals the judgment of the district court awarding William Dunn $500,000 in compensatory damages for asbestos-related injury and $2 million in punitive damages.

I.

PROCEDURAL POSTURE

In 1987 William Dunn, a former pipe installer at Hess Oil Virgin Islands Corporation (HOVIC), filed this action against OCF as well as other manufacturers of asbestos-containing products, alleging personal injuries caused by exposure to asbestos. Following a trial in which liability and compensatory damages were determined before the issue of punitive damages, the jury awarded Dunn $1.3 million in compensatory damages and $25 million in punitive damages against the sole remaining defendant, OCF, the distributor and later manufacturer of Kaylo, an asbestos-containing pipecovering.

OCF filed post-trial motions pursuant to Federal Rules of Civil Procedure 50(b) and 59 requesting a

Judgment Notwithstanding the Verdict or, in the alternative, a new trial. The district court denied the motion for JNOV, but conditioned the denial of the motion for a new trial on Dunn's acceptance of a remittitur of the compensatory award to $500,000 and the punitive award to $2 million. Dunn v. Owens-Corning Fiberglas, 774 F. Supp. 929, 951-52 (D.V.I. 1991). Dunn accepted the remittitur, and OCF appeals. We have jurisdiction under 28 U.S.C. § 1291 (1988).

II.

STANDARD OF REVIEW

In ruling on a motion for JNOV, the district court must view the evidence, together with all reasonable inferences therefrom, in the light most favorable to the verdict winner. Rotando v. Keene Corp., 956 F.2d 436, 438 (3d Cir. 1992).

We apply the same standard on appeal as the district court, id., and will affirm the denial of the motion "unless the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." Dawson v. Chrysler Corp., 630 F.2d 950, 959 (3d Cir. 1980) (internal quotations omitted), cert. denied, 450 U.S. 959 (1981).

We review the denial of a motion for a new trial for abuse of discretion, Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 290 (3d Cir.), cert. denied, 112 S.Ct. 373 (1991), and note that "the district court ought to grant a new trial on the basis that the verdict was against the weight of the evidence only where a miscarriage of justice would result if the verdict were to stand." Williamson v. Consolidated Rail Corp.,

926 F.2d 1344, 1352 (3d Cir. 1991). In addition, "we may disturb the district court's determination with respect to a remittitur only for abuse of discretion, and reverse and grant a new trial only if the verdict is so grossly excessive as to shock the judicial conscience." Gumbs v. Pueblo Int'l, Inc., 823 F.2d 768, 771 (3d Cir. 1987) (internal quotations omitted).

III.

DISCUSSION

Rather than focus its appeal on liability, OCF raises numerous issues going to damages. We will address first the compensatory damages issues, then the evidentiary issues which implicate both compensatory and punitive damages, and finally the issues relating to punitive damages, on which OCF places its primary emphasis.

A.

COMPENSATORY DAMAGES

1. Sufficiency of the Evidence

From the evidence presented at trial, the jury could reasonably have concluded the following. In 1950 Dunn went to work as a pipe installer's helper for Dow Chemical in Texas. App. at 846-47. After working in various places in the United States and the Caribbean, Dunn began working at the Hess Oil refinery in St. Croix, Virgin Islands in 1966 as a pipe installer. App. at 859-64. He testified that as a result of his duties, which often required cutting, sawing or pounding of asbestos-containing insulation, he was covered from head to toe in dust from early morning until he left work. App. at 868-69. Dunn identified OCF's Kaylo as the asbestos-

containing insulation product he used most.[1] App. at 870.

Beginning in the mid-1980s, Dunn began to experience shortness of breath and weight loss. App. at 878-79, 888. He was diagnosed as suffering from "a lung condition . . . caused by asbestos." App. at 879. Prior to that time Dunn enjoyed a variety of athletic activities, including running, swimming, biking, and weight lifting. App. at 876. He claims that because of his lung disease, he can no longer engage in the athletic activities he enjoyed previously. App. at 889. Dunn testified about his great fear of contracting cancer in the future and his depression at seeing long-time

---

[1] The parties stipulated that from 1953 through 1972, Kaylo contained an average of 15 percent asbestos. App. at 963, 1068.

friends die of asbestos-related disease. App. at 889-92.

Dunn asked for compensatory damages for present and future pain and suffering, including compensation for his fear of contracting cancer. OCF contends that Dunn did not adduce enough evidence at trial to show that he suffers from compensable injury. In particular, OCF claims that under the American Thoracic Society standards for diagnosing asbestosis, the evidence presented at trial demonstrates that Dunn does not exhibit the conditions necessary for a diagnosis of asbestosis.

Under the Virgin Islands Code, in the absence of local law to the contrary, the Restatements of the law approved by the American Law Institute control. V.I. Code Ann. titl. 1 § 4 (1967); see Berroyer v. Hertz, 672 F.2d 334, 340 (3d

Cir. 1982). OCF notes that Restatement (Second) of Torts sections 388 and 402A make "harm" an essential element of claims for negligence and strict liability. However, section 7(2) defines "harm" as "the existence of loss or detriment in fact of any kind to a person resulting from any cause." Restatement (Second) of Torts §7(2) (1965). Comment b explains that "'[h]arm' implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing. . . . In so far as these acts or conditions are detrimental to him, he suffers harm." Id. cmt. b.

It is undisputed that Dunn has extensive pleural thickening on the exterior of his lungs. See App. at 661-62, 762-63. OCF nevertheless argues that the presence of pleural plaques does not

constitute compensable injury, citing Purjet v. Hess Oil Virgin Islands Corp., 22 V.I. 147, 149 (D.V.I. 1986), for the proposition that Dunn must prove "[a]ctual injury or damage" to recover. In that case, plaintiffs, neither of whom suffered from any asbestos-related condition, brought a suit seeking, inter alia, damages for enhanced risk of developing asbestos-related diseases. In granting summary judgment for the defendants, the district court held that under Virgin Islands law, "a tort claim will not lie in the absence of a demonstrable injury [and] mere exposure to asbestos is insufficient to state a cause of action." Id. at 154; see also Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir.) (for purposes of F.E.L.A. claim, "manifest injury [is] a necessary element of an asbestos-

related tort action"), cert. denied, 474 U.S. 864 (1985).

We need not decide in this case whether the mere presence of pleural plaques constitutes the "harm" necessary to recover damages for tort under the Restatement. We note that more recent cases applying the law of states within this circuit have held that it is. Thus, in Martinart v. Asbestos Corp., No. 1816, 1992 Pa. Super. LEXIS 2193 (July 20, 1992), the Pennsylvania Superior Court, sitting in banc, held that "pleural thickening, even when asymptomatic, is an injury which gives rise to a cause of action."[2] Id. at *24.

---

[2] In light of the evidence in this case we need not decide the effect of Martinart on our earlier decision in Howell v. Celotex Corp., 904 F.2d 3, 5 (3d Cir. 1990), that under Pennsylvania law the determination of whether pleural thickening constitutes compensable injury is for the trier of fact.

Two medical experts testified on Dunn's behalf. Dr. David Egilman, who is board certified in internal and occupational medicine with a specialty in occupational lung disease, see App. at 156, stated that Dunn had "the exact injuries that you would expect if someone was injured from breathing in the asbestos." App. at 164. He also stated that he was "certain that [Dunn] has asbestos-related lung disease, both in the lung tissue and around the lung," and concluded that Dunn suffers from asbestosis. App. at 297.

Dunn's other expert witness, Dr. David Kern, also certified in occupational and internal medicine, concurred in this diagnosis, stating that Dunn "definitely did have asbestosis." App. at 666. Both experts testified that when they examined Dunn's lungs they

heard rales, a velcro-like sound indicative of asbestosis. App. at 294-95, 680. These observations mirrored that of the first doctor to examine Dunn in 1985. App. at 294.

Dr. William Cole, OCF's radiology expert, testified that the outer lining of Dunn's lungs displayed pleural plaques and that asbestos exposure was probably the cause. App. at 762-63, 765. This same conclusion was reached by Dr. Kern who stated that Dunn's pleural plaques were massive. App. at 662. Dr. Kern also testified that pleural plaques "have an effect on lung function." App. at 661. Dr. Cole agreed that in an advanced stage, pleural plaques could affect lung functioning. App. at 818.

Thus, in this case, there is evidence, if believed, that Dunn suffers from more than mere pleural plaques. In

the first place, Dunn's plaques "are massive." App. at 662. Dunn "ha[s] both scarring of the lining of the lung, both in front and on the muscle that's under the lung. And he also has scarring in the lung tissue." App. at 272. In the second place, and more important, Dunn's experts testified that as a result of his exposure to asbestos, Dunn has reduced lung capacity. Tests performed demonstrated that Dunn's lung capacity decreased by about 20% between 1985 and 1989 and that a further decrease occurred between 1989 and 1990. App. at 277-78. Dr. Egilman testified that Dunn's disease was progressing at a rapid rate and that his total lung capacity would continue to decrease. App. at 299. According to both Drs. Egilman and Kern, such a decrease is abnormal and consistent with

a diagnosis of asbestosis. App. at 279-80, 668-70.

Furthermore, in 1989, a small nodule was discovered on Dunn's lower left lung. App. at 288-89, 890. Although Dr. Egilman did not believe it was malignant at that time, he recommended that it be examined and x-rayed every three to five months. App. at 290-91. Finally, Dr. Egilman testified that Dunn had a greater than fifty percent chance of dying from an asbestos-related disease and that Dunn's fear of contracting cancer was reasonable. App. at 300.

While OCF did present colorable evidence tending to contradict the conclusions of Dunn's experts, it was not so overwhelming that the jury could not reasonably conclude that Dunn suffers from mild asbestosis which is likely to worsen. As the district court properly

noted, "[i]t was well within the jury's province to decide to credit the testimony of plaintiff's doctors while discounting that of defendant's." Dunn, 774 F. Supp. at 937. Dunn's shortness of breath and inability to engage in the extent of physical activity he enjoyed previously are detrimental effects that constitute sufficient "loss or detriment" to justify an award of compensatory damages.

In Herber v. Johns-Manville Corp., 785 F.2d 79 (3d Cir. 1986), a case brought by a plaintiff with pleural thickening, we ruled that under New Jersey law a plaintiff need only demonstrate "slight impact and injury . . . to warrant recovery for emotional distress caused by fear." Id. at 85; see Sullivan v. Combustion Eng'g, 590 A.2d 681, 683 (N.J. Super. Ct. App. Div.)

(citing Herber with approval), cert. denied, 598 A.2d 897 (N.J. 1991). Thus, even assuming Dunn does not suffer from asbestosis, the jury was free to conclude that notwithstanding OCF's evidence of Dunn's physical activity, the physical impact of Dunn's pleural plaques caused enough harm to warrant recovery, particularly when combined with the anxiety associated with the fear of cancer.[3] See McCleary v. Armstrong World Indus., Inc., 913 F.2d 257, 258

---

[3] In Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.) (en banc), cert. denied, 478 U.S. 1022 (1986), the court stated:

> [Plaintiff's] fear is plainly a present injury. It is a fear which he experiences every day and every night. It is a fear which is exacerbated each time he learns that another victim of asbestos has died of lung cancer. It is fear which, regardless of whether [plaintiff] actually gets cancer, will haunt him for the rest of his life.

Id. at 414 (footnote omitted). These words are equally applicable to Dunn.

(5th Cir. 1990) (upholding under Texas law jury verdict in asbestos case where plaintiff suffered from "pleural fibrosis"); Dartez v. Fibreboard Corp., 765 F.2d 456, 468 (5th Cir. 1985) (accumulation of asbestos fibers in lungs sufficient injury under Texas law to support claim for fear of cancer).

2. Excessiveness of the Remitted Compensatory Damages Award

OCF asks this Court for further remittitur of the district court's compensatory damages award, arguing that comparison to awards in similar cases and that lack of proof of special damages demonstrate the excessiveness of the remitted $500,000 compensatory award. Admittedly, $500,000 is generous, but it certainly is not the highest award of its kind, see App. at 1842, 1843, 1918, 1919, 1921, and does not shock our judicial

conscience. Given our deferential scope of review, see Gumbs, 823 F.2d at 771, we conclude that the district court did not abuse its discretion in granting a remittitur to $500,000.[4]

B.

EVIDENTIARY ISSUES

1. Testimony of Dunn's Expert Witness

OCF argues that both the punitive and compensatory damages awards should be reversed because of the district court's evidentiary rulings under Federal Rule of Evidence 702.[5] This court reviews

---

[4] OCF argues that the size of the jury's initial $1.3 million award alone indicates passion or bias requiring a new trial. We disagree. Other juries have awarded such sums in similar cases, see, e.g., App. at 1843 ($1.091 million awarded to plaintiff with asbestosis), and we find nothing in the record suggesting bias or prejudice.

[5] This rule permits expert testimony, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Fed. R. Evid. 702. The commentary to this rule further explains: "The rule . . . recognizes that an expert on the stand may give a dissertation or exposition of

evidentiary rulings under Rule 702 for abuse of discretion. See United States v. Leo, 941 F.2d 181, 188 (3d Cir. 1991). We have explained that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Fed. R. Evid. 103(a); see also Linkstrom v. Golden T. Farms, 883 F.2d 269, 269 (3d Cir. 1989). We "will interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases." Linkstrom, 883 F.2d at 270; see also American Technology Resources v. United States, 893 F.2d 651, 655 (3d Cir. (helpfulness standard interpreted broadly), cert. denied, 495 U.S. 933 (1990); Breidor v. Sears, Roebuck & Co.,

---

scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts." Id., Advisory committee's note.

722 F.2d 1134, 1139 (3d Cir. 1984) ("[h]elpfulness is the touchstone of Rule 702").

We have previously expressed our view that in most cases "'[t]he jury is intelligent enough, aided by counsel, to ignore what is unhelpful in its deliberations,'" and noted that "'even when jurors are well equipped to make judgments on the basis of their common knowledge and experience, experts may have specialized knowledge to bring to bear on the same issue which would be helpful.'" In Re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 279 (3d Cir. 1983) (quoting 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶¶ 702[03], 702[02]), rev'd on other grounds, 475 U.S. 574 (1986). Finally, "to the extent that [OCF implies] that expressions of opinion on the ultimate fact in issue

somehow impermissibly invades the province of the jury, it is inconsistent with the clear mandate of Rule 704." Id. (citation omitted).[6]

With these general principles in mind we address the issues raised by OCF. Dunn's principal expert witness, Dr. Egilman, is an M.D. who specializes in occupational medicine, i.e., the diagnosis and treatment of problems related to exposure to chemicals or other substances. App. at 131. The record reveals that Dr. Egilman takes referrals from companies to evaluate workers for illnesses that have occurred in the

---

[6] Rule 704 states in pertinent part:

> (a) Except as provided in subsection (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Fed. R. Evid. 704.

workplace. App. at 138. Dr. Egilman also conducts medical surveillance for companies to determine whether employees may be unduly exposed to toxic substances. App. at 139. Finally, he assists companies in analyzing information to determine whether or not substances used are harmful. When harmful substances are encountered, he instructs these companies as to

> how they should be properly handled, how workers should be educated about how to work with them so they won't get hurt, how warnings should be put on them and, in some cases, how the community physicians need to be informed.

App. at 139.

OCF claims that it was improper for Dr. Egilman to comment from his review of OCF's corporate records that OCF knew of the risks associated with exposure to asbestos. App. at 619. In light of our broad view of the "helpfulness" standard

of Rule 702 and Dr. Egilman's particular experience in working directly with employers on issues of this general concern, we find no abuse of discretion as to the admission of this testimony under Rule 702.

OCF also challenges the admission of Dr. Egilman's testimony that

> based on what they [OCF] knew in the 40's and 50's, what they could have known and didn't know, they clearly did not meet the obligation of the standard that they knew and presented in this memo in 1941.

App. at 316.

The document referred to in Dr. Egilman's testimony is a 1941 OCF memorandum discussing whether "Fiberglas," then a new material, could be safely offered to industry. The OCF memorandum states that "those who are engaged in the manufacture of Fiberglas [sic] necessarily must have reassured

themselves about the health aspects of the material before offering it for sale - for two reasons": first, from a "humanitarian point of view, no company can afford to subject its employees to an unknown hazard" and second, from "a cold business view," because of concern about liability from users. App. at 2150A-E. The memo then discusses in depth research into the potential health hazards of fiberglass. Thus, Dr. Egilman's testimony expressed his own belief that OCF's conduct with respect to Kaylo did not meet its own self-imposing standard. Again, such commentary was not so inappropriate that we must hold that the district court abused its discretion in admitting this testimony.[7]

---

[7] OCF also challenges Dunn's follow-up question, which asked whether that statement represented Dr. Egilman's "opinion to a reasonable medical probability as a health hazard consultant to industry." App. at 316.

OCF also argues that it was improper for Dr. Egilman to state his conclusion that OCF was "the last company to put warnings" on its asbestos products and that those warnings did not appear on OCF materials until 1972. App. at 316. We agree with OCF. The jury did not need expert opinion to evaluation when OCF put warning labels on its Kaylo product.

Nevertheless, we conclude that such error was harmless. In particular, we note the testimony of Dunn, App. at 870-74, and his product identification witness, Mr. McComely Bully, App. at 631-32, that they did not recall seeing warning labels on the Kaylo boxes. In addition, OCF vigorously disputed Dr.

We view this question as nothing more that Dunn's attempt to underscore Dr. Egilman's qualifications. Even assuming that the question was improper, OCF did not object to it, and we do not find it so prejudicial as to constitute plain error.

Egilman's contention during the trial, see App. at 1235-39, and was not substantially prejudiced by this isolated remark.

The admissibility of particular expert testimony must be evaluated on review in the context of the entire case. For that reason, cases from other circuits on which OCF relies are not very helpful. Thus, for example, in Andrews v. Metro N. Commuter R.R. Co., 882 F.2d 705, 708 (2d Cir. 1989), cited by OCF, the court vacated the plaintiff's jury verdict in part because the expert testimony referred to facts that were not in evidence and expressed his belief that the railroad was negligent, a patently improper statement. See Fed. R. Evid. 704 advisory committee notes (improper for expert to tell jury what results to reach). In contrast, OCF does not

contend that Dr. Egilman referred to facts not in evidence. Moreover, we do not view Egilman's testimony as telling the jury the ultimate result to reach. Cf. McGowan v. Cooper Indus., Inc., 863 F.2d 1266, 1272 (6th Cir. 1988) (approving district court's exclusion of expert's proposed testimony, which included conclusion that defendant was negligent). We will not reverse the verdict based on his testimony.

2. The Hemeon Report

OCF also contends that it was reversible error for the district court to admit the Asbestos Textile Institute's unpublished Hemeon Report. Specifically, OCF argues that the report was irrelevant under Federal Rule of Evidence 402 and that its prejudicial impact outweighed

its probative value, warranting exclusion under Federal Rule of Evidence 403.[8]

Rulings under Rule 403 are reviewed for abuse of discretion, see In Re Japanese Elec. Prods. Litig., 723 F.2d at 260, and, as we noted in our recent opinions, so are relevancy determinations under Rule 402. See Pfeiffer v. Manion Center Area Sch. Dist., 917 F.2d 779, 781 (3d Cir. 1990); Anderson v. Pittsburgh - De Moines Corp., 893 F.2d 638, 641 (3d Cir. 1990).

The Hemeon Report questioned whether the then-generally acknowledged threshold

---

[8] Under Rule 403,

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

limit value for levels of exposure to asbestos provided assurances of safety. Prior to this report, both the 1938 Dreessen study, prepared under the direction of the Surgeon General, and the 1946 Fleisher-Drinker study indicated that asbestosis would not result if asbestos dust were kept below 5 million particle per cubic foot of air. In 1946, the American Conference of Governmental Industrial Hygienists promulgated a threshold limit value of 5 million particles per cubic foot, which became widely accepted.

According to comment j of the Restatement section 402A, a manufacturer is liable for danger of which the manufacturer "has knowledge, or by application of reasonable, developed human skill and foresight, <u>should have knowledge</u>." Restatement (Second) of

Torts § 402A cmt. j (1965) (emphasis added). The comment to section 12 of the Restatement further states, in relevant part:

> "[S]hould know" implies that the actor owes another the duty of ascertaining the fact in question. . . . "Should know" indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty.

Id. at § 12 cmt. a. Dunn argued that the Hemeon Report was admissible as evidence of what OCF should have known concerning the dangers associated with exposure to asbestos.

We find persuasive the analysis of the Second Circuit in George v. Celotex Corp., 914 F.2d 26, 28-31 (2d Cir. 1990), where the court held that the district court did not abuse is discretion in admitting the Hemeon Report in an

asbestos case against Celotex Corporation, a company which, like OCF, was not a member of the Asbestos Textile Institute. As in this case, there was no evidence on the record in George to indicate that Celotex ever had access to the report. In applying New York strict liability law, which "'generally follows the guidelines set forth in § 402A [of the Restatement],'" id. at 28 n.1 (quoting Farina v. Niagara Mohawk Power Corp., 438 N.Y.S.2d 645, 646 (App. Div. 1981)), the court concluded that the report was relevant to show "what, if the jury so determined, Celotex reasonably should have known had it either conducted its own tests or been in contact with others in the industry . . . that were testing." Id. at 29. This rationale applies with equal strength here.

With respect to Celotex's argument that the prejudicial impact of the report outweighed its probative value, the court concluded that "[a]ny prejudice to Celotex was derived from the Hemeon Report's probative force and thus did not unfairly prejudice Celotex." Id. at 31. Once again, the same is true in this case. OCF argues that George is distinguishable because the court applied a "could have known" rather than a "should have known" standard in that case. However, we find no support for that subtle distinction in the George opinion.

OCF refers us to Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986) (applying Maryland law), and Murphy v. Owens-Illinois, Inc., 779 F.2d 340 (6th Cir. 1985) (applying Tennessee law), cases in which the

admissibility of the Hemeon Report was not in issue. Instead, in these cases the courts merely upheld the respective district courts' exclusion of certain other documents and testimony.[9] Many of the asbestos cases are based on the same general body of industry documents, and the courts of appeals have tended to uphold the discretionary rulings, albeit different, of the trial courts. Compare Lohrmann, 782 F.2d at 1159-60 (holding that district court did not abuse its discretion in excluding documents gathered by Sumner Simpson, a former president of Raybestos Manhattan (now Raymark)), with King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1025 (5th Cir. 1990) (no abuse of discretion in

---

[9] The Hemeon Report contains no prejudicial exhortations of the type that characterized the testimony which the court of appeals found "highly prejudicial" in Murphy. 779 F.2d at 344.

admitting Sumner Simpson papers as they are "relevant to the issue of what knowledge was scientifically discoverable by the industry as a whole at a certain time"), cert. denied, 111 S. Ct. 2236 (1991).

In light of the relevance of the Hemeon Report to what OCF "should have known" concerning the dangers associated with asbestos, and the absence of unfair prejudice to OCF, we find no abuse of discretion in its admission.

C.

PUNITIVE DAMAGES

We turn finally to OCF's vigorous attack on the punitive damage award, reduced by the district court to $2 million. OCF's attack is wide-ranging. The jury's verdict, and the district court's remittitur, can be evaluated only in the context of the evidence introduced

by Dunn in the punitive damages phase of the trial. We therefore consider first OCF's challenge to the sufficiency of the evidence.

1. Sufficiency of the Evidence

Under the Restatement, "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2) (1977). Such conduct must be shown by clear and convincing evidence. Acosta v. Honda Motor Co., 717 F.2d 828, 839 (3d Cir. 1983). OCF argues that the evidence was insufficient to support the award of punitive damages or, in the alternative, that the verdict went against the clear weight of the evidence, requiring a new trial on whether punitive damages are appropriate.

OCF points to evidence tending to show that prior to its decision to place warning labels on Kaylo boxes, the prevailing industry belief was that asbestos insulation products were safe. See App. at 1522-24. OCF argues that its Kaylo product was considered an improvement over prior insulation products because it contained a lower percentage of asbestos. It points to an independent study conducted by Union Carbide between 1961 and 1963 which concluded that Kaylo, unlike Johns-Manville and Philip Carey products, could be safely used within the 5 million particles per cubic foot threshold limit value established by the American Conference of Governmental Industrial Hygienists in 1946. See App. at 1355-72, 2287-97.

Nevertheless, we conclude that Dunn presented more than sufficient evidence from which a jury could conclude that OCF acted "with reckless indifference" in failing to place adequate warnings on its Kaylo product. Dunn's evidence revealed the following: In the early 1940s, insulation workers threatened to demand higher wages when using OCF's fiberglass material because of perceived health threats. See App. at 725-26. In response to this threat, Edward Ames, OCF's public relations officer and an assistant to its president, developed a plan to resolve this problem. As Ames explained, OCF had learned by this time that exposure to asbestos fibers could cause asbestosis. App. at 726.

In a memorandum OCF's president and executive vice-president dated January 7, 1942, Ames made the following

recommendation to inform workers of the extent of the hazard posed by asbestos-containing materials:

> Gather as a weapon-in-reserve an impressive file of photostats of medical literature on asbestosis. Available are two bibliographies covering medical literature to 1938, citing references to scores of publications in which the lung and skin hazards of asbestos are discussed. This file would cover five or six hundred pages . . . .

App. at 2151. This memorandum suggested that if OCF was unsuccessful in convincing union officials of the benefits of fiberglass as opposed to asbestos-containing insulation products, then this "asbestosis weapon-in-reserve" would be sent to union workers to "let them stew." App. at 2152.

When asked if OCF's then-president, Harold Boeschenstein, knew that asbestos products might pose a hazard to the lungs, Ames answered, "Mr. Boeschenstein

knew everything." App. at 727. In addition, OCF's attorney thought that Ames' plan was "a germ of a major strategy" and approved compiling an asbestosis file. App. at 729.

In 1943 Ames wrote another memorandum in which he criticized a proposal for adding asbestos to fiberglass, see App. at 732-33, writing:

> In formulating our policy on admixtures with asbestos, we should keep on the alert because otherwise we will run the risk of smearing fiberglas [sic] with the hazards of exposure to asbestos.
>
> Fabrication of asbestos [in both textile and pre-textile form] is a dusty process, and exposure to asbestos fly involves the danger of asbestosis, a pathological lung condition . . . minimized by the use of hoods and . . . respirators.

App. at 2154.

1944 Ames received a letter from a physician informing OCF that a patient of his, who worked as an insulator, had

developed asbestosis from exposure to insulation products. The letter stated in pertinent part:

> pipe coverer handling . . . asbestos . . . products on industrial insulation jobs [was] suffering from asbestosis, a condition that results from exposure to asbestos dust. The disease is a well recognized form of lung pathology that manifests itself in a diminution of lung capacity resulting in dyspnoea or shortness of breath.

App. at 2155.

OCF began distributing Kaylo products in 1953, and from 1958 until 1972 manufactured Kaylo insulation. App. at 1068. In the 1950s, Dr. Garret Schepers, head of the Saranac laboratory in New York, warned OCF that Kaylo contained material that would be hazardous to human beings. App. at 1018. Dr. Schepers also wrote two letters to Dr. M.D. Burch, director of personnel and industrial relations at OCF at the time,

advising him that "asbestos is fairly well incriminated as a carcinogen," App. at 2198, and that asbestos dust caused fibrosis. App. at 2207. Despite these warnings, OCF published brochures which repeatedly represented Kaylo as "non-toxic." App. at 2209, 2210, 2211, 2212, 2215. In addition, OCF touted Kaylo's "ease of application," see App. at 2211, and its "pleasant handling characteristics." App. at 2212. These brochures contained no warning of potential hazards.

A 1960 study of one of OCF's Kaylo manufacturing plants revealed that excessive asbestos dust exposure resulted from simply packing Kaylo into boxes. App. at 220-22. In 1963 the head of OCF's product development laboratory informed various corporate officers around the country that "[a]sbestos (as

found in Kaylo) when breathed into the lungs causes asbestosis which often leads to lung cancer." App. at 2221. In 1964 the National Insulation Manufacturers Association, of which OCF's representative was a director, noted that Johns Manville had decided to place warnings on its asbestos products. App. at 2225. OCF, however, declined to do so, see App. at 2229, even though it knew that insulators had a six to seven times greater incidence of lung cancer than the general male population. App. at 2226.

In early 1965, Dr. F.H. Edwards of OCF wrote to OCF's medical director as well as other corporate officials urging that serious consideration be given to labelling Kaylo products since "the amounts requested [by claimants] are usually sizeable." App. at 2229. Dr. Edwards reiterated this suggestion in a

memorandum dated August 6, 1966 in which he also acknowledged that "[i]t is impossible to guess the amount of dust created by the cutting, sawing, etc. of Kaylo. There are too many local factors involved." App. at 2230-31. While OCF claimed that by December 1966 it had placed warning labels on its products,[10] see App. at 1230, Dunn testified that he did not see warning labels on any of the cartons holding Kaylo that he observed in the Virgin Islands. App. at 870, 873. This testimony was echoed by McComely Bully, one of Dunn's co-workers at HOVIC. See App. at 623-34, 645. OCF did not offer the testimony of any HOVIC worker to the contrary.

---

[10] In a memorandum dated December 19, 1966, it was stated that a warning label should be "show[n] on all cartons in which we deliver Kaylo products." App. at 2236.

Dr. Egilman testified about the medical literature available at the time concerning the potential harm of exposure to asbestos dust. He noted that in the 1930s medical literature questioned the health effects of exposure to asbestos by insulators, particularly if the dust could be seen. App. at 167-71. In 1947 the confidential Hemeon Report was issued to the Asbestos Textile Institute, of which OCF has never been a member. This report questioned whether the then-generally acknowledged TLV for levels of exposure to asbestos provided "complete assurance[s]" of "thorough[] safe[ty]." App. at 204-006, 2181. Finally, Dr. Egilman testified about a 1949 article in the Journal of the American Medical Association that recognized that asbestos workers were at risk of developing cancer. App. at 233. In his opinion,

that article "establishe[d] that the general medical community was aware of the fact that asbestos caused cancer." App. at 233.

In light of this evidence, we agree with the recent conclusion of the Virginia Supreme Court that

> [t]he jury may have concluded . . . that Owens-Corning knew that inhalation of dust from its Kaylo product could cause lung disease in humans, that it actively concealed this danger, and it did not warn insulators of this hazard . . . .

Owens-Corning Fiberglas Corp. v. Watson, 413 S.E.2d 630, 642 (Va. 1992). The jury could reasonably have found that OCF acted with "reckless indifference to the rights of others" in this case, Restatement (Second) of Torts § 908(2) (1977), and thus, the district court appropriately denied OCF's motion for JNOV and did not abuse its discretion in

refusing to grant unconditionally the motion for a new trial.

2. Dunn's Closing Argument

OCF claims that it was denied a fair trial on the issue of punitive damages because of several remarks made by Dunn's counsel during closing arguments to the jury. Specifically, OCF argues that the following remarks or actions were improper: (1) the argument that the jury should return a large punitive award to force OCF to stop defending asbestos cases, see App. at 1761; (2) the suggestion by Dunn's counsel that counsel for OCF lied to the jury,[11] see App. at

---

[11] Specifically, Dunn's counsel stated:

> Unfortunately, ladies and gentlemen, you have heard a story here in this courtroom the last two weeks of corporate manipulation, of corporate suppression, and a word that I hate to use, of corporate lies.
>
> But, what's so bad about that is just not things that occur over the

1755; (3) the argument that the jury should award punitive damages as a reward to Dunn to bringing this lawsuit, see App. at 1756; (4) the request that the jury draw an analogy to the criminal fine imposed on Michael Milken earlier that week, see App. at 1758-59; (5) the appeal to the jury's local prejudice against "this big multi-national company."[12]

At the outset, we note that there are aspects of the plaintiff's closing argument that we believe crossed the line between acceptable advocacy and imprudent zeal. However, our disapproval of portions of the closing is not enough to

---

> last 40 or 50 years. but, it's even occurred in this courtroom. It's occurred in this courtroom.

App. at 1755.

[12] Specifically, Dunn's counsel argued: "You've got to have courage to tell this multi-national company, that it's not going to come into the Virgin Islands and hurt people and lie about it." App. at 1762.

warrant reversal on that ground. We note that OCF failed to make a timely objection with respect to the statements referred to in (1), (3)[13] and (5)[14] above, and thus has waived its challenge to these statements on appeal. See Woods v. Burlington N.R.R., 768 F.2d 1287, 1292 (11th Cir. 1985) (per curiam) (when party fails to object to improper closing argument, court of appeals only "retain[s] the authority to review for

---

[13] Comment e to the Restatement (Second) of Torts §908 (1977), which discusses punitive damages, states in relevant part: "Included in the harm to the plaintiff may be considered the fact that the plaintiff has been put to trouble and expense in the protection of his interests, as by legal proceedings in this or in other suits." Thus, arguably statement (3) was not, in itself inappropriate.

[14] In Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 772 (3d Cir. 1975), we concluded that a similar remark made in plaintiff's closing argument on punitive damages was not "so prejudicial...as to constitute reversible error in the absence of any objection or request for a cautionary instruction." We also noted that "it is proper to assess punitive damages as a deterrent and an example to the community." Id.

plain error), [the exercise of which] is seldom justified in reviewing argument of counsel in a civil case"), rev'd on other grounds, 480 U.S. 1 (1987); Hyman v. Life Ins. Co. of N.Am., 481 F.2d 441, 444 (5th Cir. 1989) (motion for mistrial on grounds of improper closing argument did not preserve issue for appeal when motion lacked requisite specificity).

While OCF did preserve its claims with respect to points (2) and (4),[15] in general "the trial judge is in a better position than an appellate court to determine whether remarks of counsel are prejudicial." Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 772 (3d Cir.

---

[15] During Dunn's closing argument, counsel for OCF objected to the analogy to Michael Milken and asked for a curative instruction, which the court declined to give. See App. at 1758-59. In addition, directly following Dunn's closing arguments, counsel for OCF moved for a mistrial, specifically objecting to Dunn's argument that "we came in here and lied." App. at 1763.

1975), and "at least for civil trials,...improper comments during closing arguments rarely rise to the level of reversible error." Littlefield v. McGuffey, 954 F.2d 1337, 1346 (7th Cir. 1992) (internal quotation omitted); see Lewis v. Penn Cent. Co., 459 F.2d 468, 470 (3d Cir. 1972), (trial judge has broad discretion in determining whether counsel's closing remarks were proper).

Here, the district court concluded that the remarks about corporate lies "are not improper in a summation regarding punitive damages," Dunn, 774 F. Supp. at 949, relying on the trial court's statement in Herman that "[i]n attempting to convince a jury that a defendant's conduct was outrageous and should be punished, an advocate must go beyond the kind of argument necessary to establish ordinary negligence." 379 F.

Supp. 1268, 1276 (D.V.I. 1974) (footnote omitted), aff'd, 524 F.2d 767 (3d Cir. 1975); see also Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 197-98 (4th Cir. 1982) (permissible range in punitive damage arguments is wide and inescapably volatile), cert. denied, 460 U.S. 1102 (1983), rev'd in part on other grounds, 712 F.2d 899 (4th Cir. 1983) (in banc), cert. denied, 464 U.S. 1040 (1984).

OCF relies on Draper v. Airco, Inc., 580 F.2d 91 (3d Cir. 1978), to support its claim that Dunn's reference to "corporate lies" constituted reversible error. However, that case is distinguishable. In Draper,

> [c]ounsel for the plaintiff . . . committed the following improprieties: (1) he attempted to prejudice the jurors through repeated inappropriate references to the defendants' wealth; (2) he asserted his personal opinion of the justness of his client's cause; (3) he prejudicially referred to facts

> not in evidence; and (4) without provocation or basis in fact, he made several prejudicial, vituperative and insulting references to opposing counsel.

Id. at 95.[16] The remarks of Dunn's counsel, while arguably intemperate, did not approach the unprofessional and prejudicial conduct of the attorney in Draper; the reference to lies told in the courtroom hardly qualify as "vituperative and insulting references" to counsel for OCF. When read in context, it becomes apparent that Dunn's counsel was arguing that OCF and its witnesses, not its attorneys, were telling untruths.

Our review of Dunn's closing argument reveals that his counsel

---

[16] We note that references to the defendant's wealth are not, in themselves, inappropriate in a closing argument on the issue of punitive damages. See Restatement (Second) of Torts § 908(2) (1977); Herman, 524 F.2d at 772 ("the wealth of the defendant is a factor which may properly be considered by the trier of fact in assessing punitive damages").

referred to Milken to stress the point that OCF as a wrongdoer should be punished. Punishment is one of the goals of punitive damages. See Restatement (Second) of Torts § 908 cmt. a (1977). The district judge was in the best position to assess any potential prejudicial impact of this reference. In light of the evidence presented as to OCF's conduct and the closing argument as a whole, we cannot conclude that the district court abused its discretion in not providing a curative instruction or in declining to order a mistrial.

3. Jury Charge

OCF claims that the jury charge was defective both under Virgin Islands law and as a constitutional matter for failing adequately to explain how to determine the amount of the punitive damages.

a. Virgin Islands Law

OCF argues that the court's instruction was inadequate under Virgin Islands law because it did not inform the jury of the relevance of plaintiff's actual injuries in calculating punitive damages. We need not decide whether Virgin Islands law required such an instruction[17] because OCF failed to make a timely and specific objection

---

[17] Neither the language of the Restatement and the accompanying comments nor prior case law supports the proposition that punitive damages must be related to actual injuries. See Restatement (Second) of Torts § 908(2) (1977) ("trier of fact can properly consider . . . the nature and extent of the harm to the plaintiff") (emphasis added); id. cmt. c (while "the extent of the harm may be considered in determining their amount, it is not essential to the recovery of punitive damages that the plaintiff should have suffered any harm, either pecuniary or physical") (emphasis added); Hospital Auth. v. Jones, 409 S.E.2d 501, 503 (Ga. 1991) (rejecting "notion that punitive damages must necessarily bear some relationship to the actual damages awarded by the jury"), cert. denied, 112 S. Ct. 1175 (1992); Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800, 803-04 (Pa. 1989) (punitive damages need not bear reasonable relationship to compensatory damages under Restatement § 908; remittitur always available to reduce awards that shock the conscience).

challenging the charge as erroneous under Virgin Islands law. Thus, this issue was not properly preserved for appeal under Federal Rule of Civil Procedure 51.[18] See Don Kemper Co. v. Beneficial Standard Life Ins. Co., 425 F.2d 221, 222 & n.4 (3d Cir. 1970); Bogacki v. American Mach. & Foundry Co., 417 F.2d 400, 407 (3d Cir. 1969).

OCF's only suggestion that "[t]he amount of punitive damages must bear a reasonable relationship to the actual damages suffered by the plaintiff" appeared in a proffered supplemental jury instruction, App. at 1497, which the

---

[18] This rule states in pertinent part:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Fed. R. Civ. P. 51 (emphasis added).

district court did not consider because it was tendered after the cut-off for submitting instructions. See App. at 1592-94, 1605. In addition, despite being specifically informed by the district court at the time it proffered its supplemental instruction that "[a]fter [the] charge to the jury, you'll have a chance to make any exceptions you want to the charge." App. at 1594. OCF nevertheless failed to challenge the charge as deficient under Virgin Islands law after the charge was given. OCF's post-charge objections were limited to constitutional grounds, see App. at 1778, 1779, 1783, and the district court responded to OCF's objection on those grounds only. See App. at 1781, 1783; see also, Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 139 n.22 (3d Cir. 1973) (rejecting under Rule 51 appeal by

defendant which objected to charge on one ground but sought to appeal on another).

As we have noted in the past, the purpose of Rule 51 is to "afford the trial judge an opportunity to correct the error in h[er] charge before the jury retires to consider its verdict and to lessen the burden on appellate courts by diminishing the number of rulings at the trial which they may be called on to review." McAdam v. Dean Witter Reynolds, Inc., 896 F.2d 750, 769 n.29 (3d Cir. 1990) (quoting Porter v. American Export Lines, Inc., 387 F.2d 409, 412 (3d Cir. 1968)). In this case, a curative instruction could have remedied any infirmity in the charge. OCF's failure to make a specific objection to the court's instruction under Virgin Islands

law subverted the purpose of Rule 51,[19] and we thus decline to review OCF's objections to the charge on that ground. See United States v. Logan, 717 F.2d 84, 91 (3d Cir. 1983) (absent objection, charge reviewable for plain error only); Trent v. Atlantic City Elec. Co., 334 F.2d 847, 859 (3d Cir. 1964) (same).

b. Constitutional Law

OCF also argues that the charge was constitutionally infirm. It complains of the trial court's alleged (1) inadequate instruction on the dual goals of punitive damages; (2) failure to instruct the jury that it must take into consideration the character and degree of

---

[19] In Levinson v. Prentice-Hall, Inc., 868 F.2d 558, 564 (3d Cir. 1989), on which OCF relies, we found that the defendant had preserved its objection in accordance with Rule 51.

the wrong as shown by the evidence; and (3) inadequate post-trial review.

Before turning to the merits of OCF's constitutional challenge, we conclude that OCF failed to preserve the objection in (2) above under Rule 51. Following the jury charge, OCF objected that it was "unconstitutionally uninformed" because "it does not provide standards for the jury upon which to base an aware of punitive damages." App. at 1778. This general objection alone was not specific enough to inform the court how to provide clearer standards.

OCF's proposed jury instruction did not contain language requiring the jury to consider the character and degree of the wrong to the plaintiff, see App. at 1636-38, and it never objected on that ground. The only objection we can find that remotely resembles the point now

urged on appeal stems from OCF's suggestion that the amount of punitive damages must bear a reasonable relationship to the amount of compensatory damages. See App. at 1783. This objection did not adequately put the court on notice of the issue OCF now raises.

As the Court of Appeals for the Eighth Circuit recently stated in a similar case:

> Although [defendant] made a general objection that the court's instructions on punitive damages violated the fourteenth amendment, [its] requested instruction did not elaborate any further on the standard for setting the amount of punitive damages. While we recognize that a party need not tender specific language if it has otherwise objected to an inadequacy in an instruction, we believe the overall record here shows that [defendant] did not comply with Fed. R. Civ. P. 51 by bringing to the court's attention the need for the jury to consider the nature and degree of the wrong.

Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342, 1347 (8th Cir. 1991) (footnote and citation omitted); see also McCleary v. Armstrong World Indus., Inc., 913 F.2d 257, 260 (5th Cir. 1990). These words apply with equal force in this case, and thus we decline to review this point on appeal.

Turning to the remainder of OCF's constitutional objections to the charge, we look, of course, to Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991), the Supreme Court's most recent pronouncement on punitive damages. In Haslip, the Court held that the common-law method for assessing punitive damages is not so inherently unfair as to deny due process and be per se unconstitutional. Id. at 1043. The Court described the three-tier common-law

method for assessing punitive damages as follows:

> Under the traditional common-law approach, the amount of the punitive damage award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Id. at 1042.

In its analysis of the constitutionality of the punitive damages award of over $800,000 in the case before it, the Court eschewed drawing "a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." Id. at 1043. The Court noted, however, that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a

jury properly enter into the constitutional calculus." Id.

The Court looked first to the jury instruction and concluded that while it gave the jury "significant discretion," the instruction nonetheless "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." Id. at 1044. Although the district court's jury instruction in this case was not a word-for-word duplication of the charge in Haslip, it contained all of the elements identified by the Court in Haslip. The instruction adequately conveyed that punitive damages are to punish the defendant and deter it and others from similar conduct in the future. See App. at 1777-78 ("it should

be an award which stings [i.e. punishes] the defendant and will act as a deterrent to such conduct by the defendant in the future and a warning to others"). The district court also told the jury that it was not required to award punitive damages, and that they are "allowed only for wanton and reckless behavior ... [where] defendant's conduct was outrageous because done with an evil motive or done with reckless indifference to the rights of others." App. at 1776.

Other courts of appeals have approved similar jury charges as providing due process under Haslip. See Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1097 (5th Cir. 1991), cert. denied, 112 S. Ct. 1778 (1992); American Employers Ins. v. Southern Seeding Svc., Inc., 931 F.2d 1453, 1457-58 (11th Cir. 1991). But see Mattison v. Dallas

Carrier Corp., 947 F.2d 95, 105-06 (4th Cir. 1991). While we acknowledge that the district court could have given the jury more guidance on the issue of punitive damages,[20] we cannot conclude that the charge was constitutionally defective.

The second inquiry made by the Court in Haslip was whether the post-trial procedures ensure "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." 111 S. Ct. at 1044. Of course, if a charge is fatally defective, it will not be cured by post-trial

---

[20] Under the Restatement, in determining the amount of punitive damages, the trier of fact can consider such factors as (1) the act itself, including the motives of the wrongdoer, the relations between the parties, and provocation or want of provocation; (2) the extent of harm to the injured person, including the expense to which plaintiff has been put in bringing a lawsuit; (3) the wealth of the defendant; and (4) the existence of multiple claims. Restatement (Second) of Torts §908 cmt. e (1977).

review. We have found no fatal defect. Nonetheless the scope of both trial court and appellate review were significant features in the Court's approval of the Haslip jury's punitive damage award, and thus we consider those applicable here.

In Haslip, the Court noted that under the applicable Alabama precedent, the factors a trial court considers in scrutinizing a jury verdict for excessiveness of the damages are "the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' the 'impact upon the parties,' and 'other factors, such as the impact on innocent third parties.'" 111 S. Ct. at 1044 (quoting Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986).

Under federal law as well, a district court reviews damages awards for

excessiveness, see Kazan v. Woltnski, 721 F.2d 911, 914 (3d Cir. 1983) (remittitur available only when "so large as to shock the conscience of the court"). The district court in this case appropriately applied this standard, see Dunn, 774 F. Supp. at 950, and indeed ordered a remittitur and provided reasons for that decision. OCF complains that the trial court did not review the jury award de novo, but only gave it substantial deference. The court stated that it would "remit the portion of the verdict in excess of the maximum amount supportable by the evidence." Id., (quoting Kazan, 721 F.2d at 914). Nothing in Haslip requires more.

We recognize that in Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991), the court held that the procedure applied under South Carolina

law to punitive damages awards did not provide due process and that Virgin Islands procedure is similar in that neither jurisdiction mandates a set of criteria a jury must consider when calculating punitive damages. We are unpersuaded by Mattison. Instead, we agree with the holding in Glasscock, 946 F.2d at 1098-99, a diversity case involving Texas law, that federal post-trial review under Rules 50 and 59 and federal appellate review of a jury award provide sufficient constraint on a jury's discretion to satisfy the requirements of due process. See also Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1380-86 (5th Cir. 1991) (same, in diversity case applying Missouri law).

Although the court in Mattison concluded that the standards for calculating punitive damages awards were

unconstitutionally vague, relying on Giaccio v. Pennsylvania, 382 U.S. 399 (1966), see Mattison, 947 F.2d at 102-03, this precise argument was rejected by the Court in Haslip, which distinguished Giaccio on the ground that it concerned the imposition of liability rather than the jury's discretion in fixing the amount of damages or costs. 111 S. Ct. at 1046 n.12. Furthermore, we deem it significant that under the Virgin Islands law (as under South Carolina law) a plaintiff must establish liability for punitive damages by clear and convincing evidence, a higher burden than under the Alabama scheme upheld in Haslip which only required proof by a preponderance of the evidence. See id. at n.11 (specifically declining to hold that due process required a greater standard of proof).

Finally, we underscore the "fact intensive nature of the due process analysis articulated in Haslip." Eichenseer, 934 F.2d at 1386. In this case after the district court reviewed the record and determined that the evidence supported a finding of willfulness and wantonness on OCF's part, see Dunn, 774 F. Supp. at 948-49, it considered OCF's net worth, the relationship between the size of the compensatory award and its remitted punitive damages award,[21] and the size of such awards in other cases in

---

[21] Specifically, the district court concluded that $2 million was an appropriate amount to offer in remittitur as "th[is] sum is rationally related to the $500,000 in compensatory damages without having exceeded the multiple of four constitutionally permitted by the Supreme Court in Haslip." Dunn, 774 F. Supp. at 951 (citation omitted). In Haslip the Court found the punitive damages award in that case to be reasonable even though it exceeded the compensatory award by four times because "it d[id] not cross the line into the area of constitutional impropriety." 111 S. Ct. at 1046.

determining that remittitur was appropriate. See id. at 951. This independent review led the court to conclude that a $2 million dollar award would both act as an adequate punishment and deterrent.[22] These factors considered in post-trial review were approvingly referred to in Haslip, and serve as an effective counterpoint to the wide discretion given the jury.[23]

---

[22] We recommend that in the future district courts explicitly assess the amount of a punitive damages award in light of the factors set out in comment e of the Restatement. See supra, note 20.

[23] In Haslip, the Court listed the factors considered under Alabama law in post-trial and appellate review:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the

The third check referred to by the Haslip Court on the jury's or trial court's discretion was the Alabama Supreme Court's review of punitive awards. We will perform an analogous function in the next section. The Constitution requires no more.

4. Excessiveness of the Punitive Damages Awarded

> defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

111 S. Ct. at 1045. In addition, the Alabama Supreme Court conducts a comparative analysis. Id.

In satisfying itself of the reckless character of OCF's relationship between the size of the compensatory and punitive awards, the district court found evidence to support three of the factors listed above (i.e. factors (a), (b) and (d)). It also conducted a comparative analysis. This review was enough to support the award of punitive damages in this case. See Eichenseer, 934 F.2d at 1382-84 (evidence in record sufficient to satisfy three of seven Haslip factors, and thus "the record in this case provides sufficient support for the award of punitive damages").

OCF's remaining contentions, although included under different headings, all are directed to OCF's claim that the punitive award is excessive. OCF first argues that the jury award was the result of passion, prejudice, or bias, and that it was an abuse of discretion for the district court not to have ordered a new trial unconditionally rather than to condition the grant of a new trial on Dunn's acceptance of a remitted damages award. If OCF had shown that the jury verdict resulted from passion or prejudice, we agree that a new trial would have been the proper remedy rather than remittitur. See Mason v. Texaco, Inc. 948 F.2d 1546, 1561 (10th Cir. 1991), cert. denied, 112 S. Ct. 1941 (1992); Hale v. Firestone Tire & Rubber Co., 820 F.2d 928, 936 (8th Cir. 1987); Westbrook v. General Tire & Rubber Co.,

754 F.2d 1233, 1241 (5th Cir. 1985); Brown v. McBro Planning & Dev. Co., 660 F.Supp. 1333, 1337 (D.V.I. 1987); Schreiffler v. Board of Educ., 508 F. Supp. 1300, 1308 (D. Del. 1981); see also 6A James W. Moore et al., Moore's Federal Practice ¶59.08[7] (2d ed. 1991).

We are unwilling to accept OCF's argument that the size of the award alone was enough to prove prejudice and passion. Even if there were some level of award that would in itself constitute an indication of prejudice and passion, see Auster Oil & Gas, Inc. v. Stream, 835 F.2d 597, 603 n.5 (5th Cir.), cert. denied, 488 U.S. 848 (1988); Wells v. Dallas Indep. Sch. Dist. 793 F.2d 679, 684 (5th Cir. 1986), we cannot hold that the $25 million award here necessarily indicates a verdict tainted by prejudice and passion in light of the evidence

before the jury concerning OCF's knowledge of the health hazards associated with asbestos, OCF's net after-tax earnings for the three years prior to trial averaged almost $200 million, and OCF's net worth of approximately $2.2 billion.[24] App. at 1743. See Mason, 948 F.2d at 1560 ($25 million punitive damages award to one plaintiff not product of passion and prejudice).

A multi-million dollar punitive damages award is not unique in products

---

[24] In Cash v. Beltmann N. Am. Co., 900 F.2d 109, 111 n.3 (7th Cir. 1990), the court, after reviewing several punitive damage awards cases, concluded that "a typical ratio for a punitive damages award to a defendant's net worth [is] around one percent." The jury's $25 million award (approximately 1% of OCF's $2.2 billion net worth) certainly fell within this range. See Gregg v. U.S. Indus., Inc., 887 F.2d 1462, 1477 (11th Cir. 1989) (approving $2 million punitive damages award which represented "4% of [defendant's] net worth of $520 million"]; Burke v. Deere & Co., 780 F. Supp. 1225, 1238 (S.D. Iowa 1991) (remitting $50 million punitive damages award to $28 million, approximately 1% of defendant's $2.8 billion net worth).

liability cases. See e.g., Glasscock, 946 F.2d at 1095 ($6.1 million jury verdict in asbestos case); O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1446-47 (10th Cir. 1987) ($10 million jury verdict to single plaintiff injured by defective tampons), cert. denied, 486 U.S. 1032 (1988); Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1571 (6th Cir. 1985) ($1.5 million jury verdict against asbestos manufacturer) cert. denied, 478 U.S. 1021 (1986); Kociemba v. G.D. Searle & Co., 707 F.Supp. 1517, 1535-38 (D. Minn. 1989) (approving $7 million jury verdict against manufacturer of defective intrauterine contraceptive device); Palmer v. A.H. Robins Co., 684 P.2d 187, 220-21 (Colo. 1984) (approving $6.2 million jury award to woman harmed by Dalkon Shield).

We have held that "where no clear judicial error or 'pernicious influence' can be identified but where the verdict is so large as to shock the conscience of the court," the appropriate action for the court is to "order [the] plaintiff to remit the portion of the verdict in excess of the maximum amount supportable by the evidence or, if the remittitur [is] refused, to submit to a new trial." Kazan v. Wolinsky, 721 F.2d 911, 914 (3d Cir. 1983). We, as well as other courts, have sustained remittiturs involving ratios to jury punitive damage awards comparable to that ordered here. See Walters v. Mintec/Int., 758 F.2d 73, 80 (3d Cir. 1985) (10 to 1 ratio); see also Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 389-90 (Cal. App. 4th 1981) (remittitur of $125 million to $3.5 million; over 30 to 1 ratio); Burke v.

Deere & Co., 780 F.Supp. 1225, 1238 (S.D. Iowa 1991) (remittitur of $50 million to $28 million); Mason, 948 F.2d at 1561 (remittitur of $25 million to $12.5 million); Republic Ins. Co. v. Hires, 810 P.2d 790, 792-93 (Nev. 1991) (remittitur of $22.5 million to $5 million); Gregg v. U.S. Indus., Inc., 887 F.2d 1462, 1477 (11th Cir. 1989) (remittitur from $18.5 to $2 million; over 9 to 1 ratio); State Farm Mut. Auto. Ins. Co. v. Zubiate, 808 S.W.2d 590, 606 (Tex. Civ. App. 1991) (remittitur of $15 million to $660,000; over 20 to 1 ratio), writ denied, (Sept. 18, 1991); West v. Johnson & Johnson Prods., Inc., 220 Cal. Rptr, 437, 462 (Cal. Ct. App. 1985) (remittitur of $10 million to $1 million; 10 to 1 ratio), cert. denied, 479 U.S. 824 (1986); Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 836-37 (Minn. 1988) (remittitur of

$12.5 million to $4 million), cert. denied, 492 U.S. 926 (1989).

If an excessive jury determination were per se proof of passion, prejudice, or bias, there would have been no reason for the Supreme Court to have said in Haslip that "[t]he Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S. Ct. at 1045. We conclude that OCF has failed to prove that the jury's $25 million verdict, admittedly quite large, was the result of passion and prejudice mandating a new trial.

OCF argues that the $2 million remitted punitive damages award was excessive and should be remitted further, focusing primarily on its claims that it

has been required to pay punitive damages awards in the past and that many suits are currently pending against it. In Acosta, 717 F.2d at 839 n.17, although we noted that "a jury might decide that a defendant's financial position, as a result of other awards of punitive damages for the same conduct, is so precarious that a sizeable award of punitive damages would be inappropriate," we declined to disapprove of multiple punitive damages awards against a manufacturer of a harmful product. Id. at 838-39. In this case, OCF made the strategic decision not to introduce into evidence before the jury information concerning other punitive damages awards assessed against it. Had it done so, the jury might have made a smaller award.

In its post-trial submissions OCF did include a list and description of

other punitive damages jury verdicts entered against it, App. at 1944-49, [25], and data on punitive damages verdicts in asbestos cases generally. See App. at 1842-1939. There is nothing in the district court's opinion that supports OCF's contention that when the trial court calculated its remitted punitive damages award, it refused to consider other such awards against OCF because that evidence should have been presented to the jury.

Nor does OCF point to anything in the record to indicate that the trial court set the remitted damages figure in consideration of OCF's conduct other than with respect to the harm it caused Dunn. Recently, several courts have concluded

---

[25] OCF did not provide any data on the actual amount it has paid on those claims.

that an asbestos manufacturer's due process rights were not violated "because the evidence demonstrated that the punitive damage awards were only for the harm inflicted upon the specific plaintiffs in each case." Owens-Illinois v. Armstrong, 591 A.2d 544, 557 (Md. Ct. Spec. App. 1991), aff'd in part and rev'd in part, 604 A.2d 47 (Md. 1992); see also King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1030 (5th Cir. 1990), cert. denied, 111 S. Ct. 2236 (1991); Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 281 (2d Cir.), cert. dismissed, 111 S. Ct. 27 (1990); Man v. Raymark Indus., 728 F. Supp. 1461, 1466 (D. Hawaii 1989); Eagle-Picher Indus., Inc. v. Balbos, 604 A.2d 445, 472 (Md. 1992). In fact, the district court explicitly referred to the amount of the compensatory damages awarded when it calculated the amount of

its remitted punitive damages award, thus demonstrating that the punitive damages award only represents punishment for OCF's conduct with respect to Dunn.[26]

OCF argues that its "negative net worth" militates against a large punitive damages award. As Dunn's expert witness testified, OCF's large indebtedness was incurred to ward off a take-over attempt in 1986, App. at 1740-41, and thus obscures the company's true value. He estimated OCF's value at the time of trial to be around $2.2 billion, App. at 1743, basing this figure on OCF's annual average after-tax earnings for the three years prior to trial of approximately

---

[26] The district court's charge that the jury only award punitive damages if "plaintiff has clearly and convincingly established that the action of the defendant which caused injury to the plaintiff was wanton and reckless," see app. at 1776 (emphasis added), further reveals the court's awareness that punitive damages were to be assessed only with respect to the harm OCF caused Dunn.

$200 million. Thus, the $2 million award was well within OCF's ability to pay.

It is evident to us that the Supreme Court in Haslip approved review by an appellate court to "determin[e] whether a particular award is greater than reasonably necessary to punish and deter." 111 S. Ct. at 1046. With this in mind we consider the effect of successive punitive damages awards in mass tort cases arising from the same course of conduct.[27] We, as well as other courts, have expressed similar concerns. See In re School Asbestos Litig., 789 F.2d 996, 1005 (3d Cir.) ("powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some

---

[27] This issue was discussed at oral argument at the request of the court, which also accepted supplemental briefing directed thereto.

responsibility for preventing repeated awards of punitive damages for the same acts or series of acts"), cert. denied, 479 U.S. 852 (1986); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838-42 (2d Cir. 1967); see also In re Federal Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir.) (Heaney, J., dissenting), cert. denied, 459 U.S. 988 (1982); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1056 (D.N.J.), modified, 718 F. Supp. 1233 (D.N.J. 1989); In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983), mandamus denied, 725 F.2d 858 (2d Cir.), cert. denied, 465 U.S. 1067 (1984).

Nevertheless, the vast majority of courts that have addressed the issue have declined to strike punitive damages awards despite claims they constituted repetitive punishment for the same

conduct. See Simpson, 901 F.2d at 280-82 (construing New York law); Jackson, 781 F.2d at 402-07 (construing Mississippi law); Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036, 1041-42 (5th Cir. 1984) (construing Texas law), cert. denied, 470 U.S. 1051 (1985); Neal v. Carey Canadian Mines, Ltd., 548 F.Supp. 357, 376-77 (E.D. Pa. 1982) (construing Pennsylvania law), aff'd 760 F.2d 481 (3d Cir. 1985); Man, 728 F.Supp. at 1465-68 (construing Hawaii law); Campell v. ACandS, Inc., 704 F. Supp. 1020, 1021-23 (D. Mont. 1989) (construing Montana law).

OCF argues that the volume of asbestos claims currently before the courts and likely to be filed in the future shows that the point of "overkill" has been reached with respect to punitive damages in asbestos litigation. OCF claims that asbestos manufacturers have

been punished enough, and that the "avalanche" of compensatory claims is more than sufficient to serve the goals of deterrence and punishment. It urges this court, as the "Supreme Court of the Virgin Islands," to strike punitive damages claims in all asbestos cases in the Virgin Islands.

As an initial matter, we question whether this court represents the appropriate forum for determining whether the imposition of successive claims of punitive damages in mass tort litigation should be allowed. See Man, 728 F.Supp. at 1466 ("it would be manifestly improper for any court to unilaterally legislate away established rights and procedures based on ... interpretation of public policy goals"); see also Robert E. Riggs, Constitutionalizing Punitive Damages: The Limits of Due Process, 52 Ohio St. L.J.

859, 914 (1991) ("assuming that the present system of punitive damages has serious negative consequences for society, a remedy is more appropriately sought by legislative rather than by judicial means").

In addition, as we recognized in Government of the Virgin Islands v. Harris, 938 F.2d 401 (3d Cir. 1991),

> [a]bsent governing statute or precedent, a "hierarchy of sources for Virgin Islands law" is found under V.I. Code Ann. tit. 1 §4 (1967). Edwards v. Born, Inc., 792 F.2d 387, 389 (3d Cir. 1986). Under §4, we look first to the common law rules set forth in the various Restatements. If no rules are available, we look to common law rules "as generally understood and applied in the United States." Id. See also Poltus v. Clark Equipment Co., 802 F.2d 75, 77 (3d Cir. 1986) (Where the Virgin Islands "has no governing statute ... [and] [w]here the Restatement is silent and a split of authority exists, courts should select the sounder rule").

Id. at 411.

The Restatement, which we are obliged to consult in exercising whatever common law authority we have in this case, does not preclude successive claims of punitive damages arising out of the same course of conduct, although it permits consideration of the existence of multiple punitive damages claims against a defendant in assessing damages. See Restatement (Second) of Torts §908 cmt. e (1977). Moreover, courts on the mainland, particularly from the other jurisdictions comprising the Third Circuit, have declined to strike repetitive punitive damage claims and awards in asbestos cases. Therefore, there is no basis for us to treat the similar awards to Virgin Islands citizens any differently.

We do not disagree with the concerns about punitive damages awards,

particularly in the asbestos cases, expressed by our dissenting colleague Judge Weis. We differ instead as to whether it is the judiciary, and particularly a panel of judges in an individual case, that should resolve the conflicting policy arguments. We eschew the activist role the dissent would place on us. Any action along that policy line is better left to Congress or the Legislature of the Virgin Islands.

To the extent that OCF claims that punitive damages in asbestos cases are as a general matter unconstitutional, we are not persuaded by its arguments. While we recognize that some courts and commentators have called for the abolition of punitive damages altogether, see, e.g. John Dwight Ingram, Punitive Damages Should be Abolished, 17 Cap. U.L. Rev. 205 (1988); James B. Sales & Kenneth

B. Cole, Jr., Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vand. L. Rev. 1117 (1984), that position is not without its critics. In fact, several commentators have challenged the popular notion that "[a]wards of punitive damages are skyrocketing." Browning Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part).

The author of a comprehensive empirical study of punitive damages awards in products liability cases concluded that both the frequency and size of punitive damages awards is "much less" than is generally believed. Michael Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts 28 (Papers of the Roscoe Pound

Found. 1991) [hereinafter "Demystifying Punitive Damages"];[28] cf. Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 13 (1990) (noting that "the punitive damages debate has become a matter of public relations, propaganda, and the mobilization of prejudice and fear, rather than a matter of rationale discourse") [hereinafter "Myth and Reality"]. While the data show that the frequency with which punitive damages are awarded in asbestos cases has risen in the five year period between 1985-1990, they also demonstrate that punitive

---

[28] After conducting an exhaustive search of several sources including published opinions, computer-data bases, law reviews and legal commentaries, court records, trial verdict reporters, and interviews with lawyers involved in products liability cases, see Demystifying Punitive Damages at 2-4, Rustad and his associates located a total of 355 products liability cases involving punitive damages awards throughout the country in the quarter century from 1965-1990.

damages awards in asbestos cases tend to be much smaller than such awards in other kinds of products liability cases. See Demystifying Punitive Damages at 30; cf. Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System - And Why Not?, 140 U. Pa. L. Rev. 1147, 1256 (1992) (noting that while mean (i.e. average) size of punitive damages verdicts has increased due to a "very few cases with exceptionally large awards," median awards have risen only moderately) [hereinafter "Behavior of the Tort System"]; Myth and Reality, 75 Minn. L. Rev. at 39-43 (concluding that median size of punitive damages awards is quite modest).

Moreover, it has been reported that in those relatively rare cases in which

punitive damages are awarded at all,[29] these awards are frequently reduced on appellate review. Demystifying Punitive Damages at 30-32; Behavior of the Tort System, 140 U. Pa. L. Rev. at 1158-62. In addition, Rustad has concluded that "[t]he difference between punitive damages awarded and punitive damages paid is often dramatic." Demystifying Punitive Damages at 32. Finally, OCF itself candidly admits that in the vast majority of the asbestos cases against it which go to trial, plaintiffs come up empty. See Appellant's Supplemental Brief at 11 (citing App. at 1943); see also App. at 1842-1939.

---

[29] In a study of punitive damages verdicts in 47 counties in 11 states, the authors noted that only 8.9% of successful products liability plaintiffs were also awarded punitive damages. See Myth and Reality, 75 Minn. L. Rev. at 38; see also Demystifying Punitive Damages at 24 (noting that while approximately 200,000 American women were injured by Dalkon Shield, there were only 11 punitive damages awards).

We make these observations simply to note that the facts underlying the issue of punitive damages in mass tort cases are far from clear, despite high profile commentary in that connection. In this case, OCF has failed to submit evidence concerning the actual amount it or other asbestos manufacturers have actually paid to satisfy punitive damages verdicts and simply has not made a "showing that the total [amount of punitive damages assessed so far] is even close to whatever limit due process might impose on the total punitive damages that may be assessed ... for ... misconduct with respect to asbestos warnings." Simpson, 901 F.2d at 281;[30] see Restatement

---

[30] We also agree with the conclusion in Simpson that all asbestos cases involving a single defendant cannot "be lumped together for the purpose of testing punitive damages against the limits of due process." 901 F.2d at 281. "The wrongfulness of a defendant's conduct will normally be subject to varying assessments

(Second) of Torts §908 cmt. a (1977); cf. Campbell, 704 F.Supp. at 1023 ("the desired effect is to deter all individuals or entities involved in the manufacture and distribution of consumer products from placing the public at risk by engaging in similar conduct").

OCF has not shown on this record that either it or the asbestos industry as a whole will be unable to satisfy current and future asbestos claims. Cf. Man, 728 F. Supp. at 1467 (noting that in case of bankrupt manufacturers, "bankruptcy court may conceive an equitable plan for creditors"). Although the costs associated with asbestos litigation may have wiped out any profits

---

depending on the degree to which the dangers of its product were known at a particular time and the deliberateness of its conduct in declining to warn or even concealing the dangers of which it was aware." Id.

OCF made from the sale of its Kaylo product, OCF failed to submit any evidence at trial concerning the profitability of its Kaylo product,[31] or concerning the profits of the other manufacturers. In any event, neither Virgin Islands law nor due process requires striking all punitive damages claims simply because the harm caused by a defective product was so severe as to wipe out all profit.

Despite these conclusions, we agree with OCF that further remittitur of the punitive damage award in this case is appropriate. See Gumbs, 823 F.2d at 773-

---

[31] It was only in its appendix to its supplemental brief to this court that OCF made any claim concerning the profitability of its Kaylo product. See Appellant's Supplemental Brief, Appendix D at 6-7 (estimating total sales at $142.7 million with total profit ranging from $1.4 million to $7.7 million). We are unwilling to act on the basis of such evidence, which was not before the district court and which was not subject to challenge by appellee.

75; Williams v. Martin Marietta Alumina, Inc., 817 F.2d 1030, 1040-41 (3d Cir. 1987); Walters, 758 F.2d at 82. In reaching this conclusion, we take into consideration all the factors listed in comment e to Restatement of Torts (Second) §908: the defendant's wealth, its act, the extent of harm, and the multiplicity of claims, and, as approved in Haslip, the comparative analysis of punitive damages awards in similar cases.

Our review of the list of jury verdicts submitted by OCF to the district court indicates to us that even the $2 million dollar figure greatly exceeds the level of punitive damages awarded in other similar asbestos cases. In addition, Dunn has thus far been spared the more severe forms of asbestos-related diseases (e.g. lung cancer, mesothelioma). It is difficult to

justify the district court's remitted $2 million award in light of the extent of Dunn's harm, consisting of at most asbestosis as well as pleural thickening. Most significant, while we commend the district court's discipline in reducing the punitive damages from $25 million to $2 million, we note that the court does not seem to have taken into consideration the effect of successive punitive awards in asbestos litigation. This factor, above all, leads us to conclude that the maximum amount of punitive damages that could reasonably have been awarded in this case is $1 million.

IV.

CONCLUSION

For the foregoing reasons we will affirm the district court's order denying OCF's motion for Judgment NOV and remitting the compensatory damage award

to $500,000. However, the judgment of punitive damages will be vacated and the case remanded to the district court for a new trial on the issue of the amount of punitive damages unless Dunn elects to file a remittitur of the punitive damages in excess of $1,000,000 since that is the maximum amount of punitive damages that we find could reasonably have been awarded in this case. OCF to bear all costs on appeal.

WEIS, Circuit Judge, dissenting.

I dissent from the judgment of the court allowing punitive damages and I would reduce the amount of the compensatory award.

I.

PUNITIVE DAMAGES

Asbestos litigation is unique. The larger number of persons exposed to

asbestos has caused a proliferation of claims, the likes of which courts have never seen, causing serious concern that the traditional tort system cannot adequately process the litigation. As this Court said in In re School Asbestos Litigation, 789 F.2d 996, 1000 (3d Cir. 1986), asbestos litigation presents "an unparalleled situation in American tort law."

In 1986, an estimated 30,000 personal injury suits had been filed against asbestos manufacturers and producers. Id. That figure has since increased substantially. The Judicial Conference Ad Hoc Committee on Asbestos Litigation reported that in 1990, 30,401 asbestos cases were pending in the federal courts alone, and about double that amount in the state courts, for a total of approximately 90,000 cases.

Judicial Conference Ad Hoc Comm. on Asbestos Litig., Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States (Mar. 1991), reprinted in Asbestos Litig. Rep., March 14, 1991, at 22,698, 22,702-03.

As might be expected, the flood of asbestos cases has taken its toll on the defendants. The Ad Hoc Committee reported that of the 25 major asbestos companies, 11 had filed petitions in bankruptcy. Id. at 22,705. In another study, a knowledgeable commentator reports that, "[a]s of July 1991, approximately fourteen former manufacturers of asbestos products had filed for bankruptcy. This number does not include the numerous smaller distributors that have been targeted in the wake of absent manufacturers and who

have in turn become insolvent." Peter H. Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J.L. & Pub. Pol'y 541, 555 (1992).

The number of claims and bankruptcy filings have created the likelihood that future claimants will not be able to recover for their injuries. As the Ad Hoc Committee said:

> "[A] large number of individuals have claims ... that are not yet ripe for adjudication. Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a 'real and present danger that the available assets will be exhausted before those later victims can seek compensation to which they are entitled.' Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1330 (5th Cir. 1985). cert. denied, 478 U.S. 1022 (1986)."

Judicial Conference Ad Hoc Comm., supra, at 22,715-16. As one of its

recommendations to Congress, the Committee suggested legislation "requiring treatment of available assets to take into account future claimants." Id. at 22,716.

It is not only claims for personal claims for personal injuries and deaths resulting from asbestos that have substantially diminished the pool of resources. In addition, thousands and thousands of property damage cases further threaten the available funds. See, e.g. In re Sch. Asbestos Litig., 789 F.2d at 1005.

The first of the major asbestos manufacturers to enter bankruptcy was Johns-Manville which sought to use Chapter 11 essentially as a giant interpleader action. As part of the Manville reorganization, a trust was created to settle pending and future

asbestos claims. Although the trust concept had the potential for equitably distributing assets to present and future claimants, the bankruptcy proceeding was itself very expensive and the results ultimately proved to be unsatisfactory.

Although punitive damages were not allowed, the trust was essentially insolvent after operating for only a year and a half. In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 754 (E. & S.D. N.Y. 1991). An Associated Press report of March 18, 1992, stated that the trust had received 192,347 claims. Stefan Fatsis, Lower Sums for Victims of Asbestos, Associated Press, March 18, 1992. A Special Master reported that the trust's funds of approximately $2.6 billion were overshadowed by present and future liabilities estimated as high as $7 billion. See In re Joint E. & S.

Dist. Asbestos Litig., 129 B.R. at 765. The swift depletion of assets was caused by high transaction costs, the failure to anticipate the magnitude of claims that would be filed, and the fact that the average settlement was much higher than expected. Id. at 754-62. Additionally, the trust paid on a first come, first served basis, rather than on priority determined by the extent of injury.

The district court intervened to impose measures for a more equitable distribution of the funds and eventually approved an arrangement that altered the distribution process so that those most seriously injured were paid first. Id. at 768-70. In addition, a serious attempt was made to predict future claims so that present and future claimants would be paid an equitable percentage of their claims' value. Id.

In commenting on the settlement, the district court noted the grim prospects for future asbestos claimants in the absence of a solution. The current defendants "do not have, and they probably will not have, assets to pay for their current and contingent asbestos liabilities given the present mode of disposing of asbestos claims." Id. at 907. The Manville experience, thus, is evidence that even purely compensatory payments for future claims are in jeopardy.

It is important to keep in mind that punitive awards are allowed only after full compensation has been awarded. Thus, punitive damages are a windfall to plaintiffs. Elimination of punitive damages would not diminish compensatory verdicts.

The Ad Hoc Committee cited a 1984 Rand study reporting that in a sample period between 1980 and 1982, punitive damages totalling $4,934,000 had been awarded in asbestos cases. Judicial Conference Ad Hoc Comm., supra, at 22,724 n.54. More recent figures are substantially higher. In testimony before a House Subcommittee on February 26, 1992, Judge William Schwarzer, the Director of the Federal Judicial Center, said:

> "[P]unitive damages compete with compensatory damages for the increasingly scarce resources of asbestos defendants and their insurers. Until the claims of future claimants become liquidated, distribution of punitive damages to current claimants creates a risk of exhausting funds before potential claimants discovery their injuries. Some mechanism to avoid this outcome, at least until more precise information becomes available about future claims, may be necessary for a national solution that has meaning for future claimants."

Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Com. on the Judiciary, 103d Cong., 1st Sess. (1992) (statement of Hon. William W. Schwarzer).

Judge Schwarzer also noted that less than 1% of asbestos cases proceed to judgment. Only in that small percentage of cases can punitive damages be recovered, and they are not awarded in every case even though the same defendant and the same conduct is at issue. Nevertheless, the potential for punitive damages is a weighty factor in the negotiations for settlement. The threat of punitive damages being awarded inevitably results in an agreement on a larger sum than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for

compensatory damages, assets that could be available for satisfaction of future compensatory claims will be dissipated.

A minority of the Court of Appeals for the Fifth Circuit forcefully raised the issue of whether the asbestos industry's resources would be inadequate to compensate future claimants. Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1330 (5th Cir. 1985) (Clark, J., joined by four others dissenting). A majority of that Court decided to certify to a state court the question of whether plaintiffs could recover punitive damages in asbestos cases. The dissenting judges, arguing that the problem was national in scope, advocated taking a more forceful stand. Noting that the "field of asbestos litigation [had] exploded," the dissent pointed out that an "already astronomical and still

growing number of plaintiffs [are] seeking individual recoveries against a finite pool of assets belonging to a relatively small group of defendants." 750 F.2d at 1330.

Taking issue with the decision to certify the question to the state court, the dissent observed that "[a] state seeking to protect its own citizens can only shape its law to maximize the recovery of its own early plaintiffs, so that at least those individuals will not be impeded in the legal scramble for a share of insufficient assets." Id.

The situation has only worsened since the time of the Jackson opinions, and a panel of that same Court in 1990 conceded its "misgivings" over awarding punitive damages in asbestos cases, but found itself shackled by binding precedent. King v. Armstrong World

Indus., 906 F.2d 1022, 1033 (5th Cir. 1990).

As the Jackson dissent commented and as we discussed in In re School Asbestos Litigation, 789 F.2d at 1001, parochial concerns tend to influence the decision to make punitive damages available in cases of this nature. That approach was apparent, for example, in Fischer v. Johns-Manville Corp., 512 A.2d 466 (N.J. 1986). In discussing the suggestion that a limitation on punitive awards be imposed, the Fischer court said, "[s]uch a cap would be ineffective unless applied uniformly. To adopt such a cap in New Jersey would be to deprive our citizens of punitive damages without the concomitant benefit of assuring the availability of compensatory damages for later plaintiffs. This we decline to do." Id. at 478. What the opinion

failed to acknowledge was that awarding windfall punitive damages to early plaintiffs poses the likely prospect that some future New Jersey plaintiffs will be unable to recover compensatory damages for their injuries.

The New Jersey Supreme Court also stated that it failed "to see the distinction, in the case of Johns-Manville [before its bankruptcy], between the effect of compensatory damages and that of punitive damages." Id. at 477. To some extent, the Court was correct. Every dollar expended on punitive damages, as well as those expended in compensatory damages, will diminish, eventually to the point of exhaustion, any resources available for paying future plaintiffs' claims. There is, however, an important distinction. Compensatory awards are a remedy for injuries

suffered. Punitive damages are not. A dissenting justice in Fischer posed an apt rhetorical question: "But why, for example, should a few Dalkon Shield users receive several millions in punitive-damages awards, while others receive nothing from the bankrupt A. H. Robins Co.?" Id. at 488 n.3 (O'Hern, J., dissenting).

Unquestionably, a national solution is needed, but Congress has declined to act despite the deteriorating situation. In the meantime, the drain on available resources continues. It is time - perhaps past due - to stop the hemorrhaging so as to protect future claimants.

This Court is confronted for the first time with an asbestos case under Virgin Islands law where punitive damages have been awarded. We are in a position

similar to that of state supreme courts in determining the common law applicable within this jurisdiction and in applying the Restatements. We have a clean slate, and are not bound by mistaken determinations in other jurisdictions.

The Restatement (Second) of Torts § 908(2) provides that "[p]unitive damages *may* be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." (emphasis supplied). Comment a explains that "[t]he purposes of awarding punitive damages...are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future."

The desirability of allowing punitive damages has been subjected to vigorous assault in recent years.

Specifically, whether the theories underlying punitive damages hold true in the mass tort context has been questioned in such cases as: In re Bendectin Prod. Liab. Litig., 749 F.2d 300, 305-07 (6th Cir. 1984); In re N. Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 851-52 (9th Cir. 1982); In re Fed. Skywalk Cases, 680 F.2d 1175, 1179-83 (8th Cir. 1982); In re Agent Orange Prod. Liab. Litig., 100 F.R.D. 718, 725 (E.D. N.Y. 1983). In none of those cases, however, did the problem match the magnitude of the asbestos litigation crisis.

I do not propose to enter the debate here over the desirability of punitive damages in general.[32] For purposes of

---

[32] For a representative - by no means complete -- sample of articles, see Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37 (1983);

Special Project, An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation, 36 Vand. L. Rev. 573 (1983); Jones, et al., Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 Ala. L. Rev. 1 (1991); Symposium, Punitive Damages, 40 Ala. L. Rev. 687 (1989); Symposium, Punitive Damages, 56 S. Cal. L. Rev. 1 (1982).

For articles favoring abolition, see: Carsey, The Case Against Punitive Damages: An Annotated Argumentative Outline, 11 Forum 57 (1975); Dubois, Punitive Damages: Bonanza or Disaster, 3 Litig. 35 (Fall 1976); Ghiardi, The Case Against Punitive Damages, 8 Forum 411 (1972); Ghiardi, Should Punitive Damages Be Abolished? -- A Statement for the Affirmative, 1965 A.B.A. Sec. Ins., Negl. & Comp. L. Proc. 282; Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870 (1976); and Sales & Cole, Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vand. L. Rev. 1117 (1984).

For articles favoring modification, see Barrett & Merriman, Legislative Remedies for Punitive Damages, 28 Fed. Ins. Couns. J. 339 (1978); Bell & Pearoe, Punitive Damages and the Tort System, 22 U. Rich. L. Rev. 1 (1987); Johnston, Punitive Liability: A New Paradigm of Efficiency in Tort Law, 87 Colum. L. Rev. 1383 (1987); Launie, The Incidence and Burden of Punitive Damages, 53 Ins. Couns. J. 46 (Jan. 1986); Levit, Punitive Damages: Yesterday, Today and Tomorrow, 1980 Ins. L. J. 257; Mallor & Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings L. J. 639 (1980); Martin, The Relation of Exemplary Damages to Compensatory Damages, 22 Tex. L. Rev. 235 (1944); McCormick, Some Phases of the Doctrine of Exemplary Damages, 8 N.C. L. Rev. 129 (1930); Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1183 (1931); Phillips, The Punitive Damage Class Action: A Solution to the Problems of Multiple Punishment, 1984 U. Ill. L. F. 153 (1984); Priest, Punitive Damages

this case, I accept the premise that in appropriate cases punitive damages may be assessed in the Virgin Islands. See Restatement (Second) of Torts § 908(2);[33] Acosta v. Honda Motor Co., 717 F.2d 828, 833-41 (3d Cir. 1983).

---

and Enterprise Liability, 56 S.C. L. Rev. 123 (1982); Riley, Punitive Damages: This Doctrine of Just Enrichment, 27 Drake L. Rev. 195 (1977-1978); Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269 (1983); and Woodbury, Limiting Discovery of a Defendant's Wealth When Punitive Damages Are Alleged, 23 Duq. L. Rev. 349 (1985).

For articles favoring the status quo, see Bedell, Punitive Damages in Arbitration, 21 J. Marshall L. Rev. 121 (1987); Bell, Punitive Damages: Their History, their Use and Their Worth in Present-Day Society, 49 UMKC L. Rev. 1 (1980); Corboy, Are Punitive Damages Getting Out of Control? The Existing Controls are Effective, 70 A.B.A. J. 16 (Dec. 1984); Courtney & Cavico, Punitive Damages: When Are They Justifiable?, 18 Trial 52 (Aug. 1982); and Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797 (1987).

[33] Professor Prosser, a Reporter for the Restatement (Second) of Torts, conceded that punitive damages in mass torts present a "problem which has arisen to haunt the courts." Noting the issue of multiple awards, he wrote: "The question might well lead to a re-examination of the whole basis and policy of awarding punitive damages." William L. Prosser, The Law of Torts § 2, at 13 (4th ed. 1971).

Furthermore, I do not propose to discuss punitive damages in terms of due process, see Pacific Mut. Life Ins. v. Haslip, 111 S. Ct. 1032, 1043 (1991), nor to consider the serious questions of bias, prejudice, and improper closing arguments to the jury present in this record.

I propose to meet head-on the issue presented here, not in terms of unfairness to the defendants, whatever the merits of that approach might be, but rather from the standpoint of unfairness to injured persons whose claims will come due after available funds have been exhausted. Thus, unlike other courts and commentators.[34] I am not concerned that

---

[34] "[W]e do not believe that defendants should be relieved of liability for punitive damages merely because, through outrageous misconduct, they may have managed to seriously injure a large number of persons. Such a rule would encourage wrongdoers to continue their misconduct because, if they kept it up long enough to injure a large number of people, they could escape all liability for punitive damages." Froud v. Celotex Corp., 107 Ill. App.

allowing defendants in the mass tort context to escape liability for punitive damages might reward them for the extent of harm caused. Such concerns are misplaced in light of the avalanche of compensatory claims against asbestos manufacturers. This has surely served as more of a punishment and deterrent that individual punitive assessments in isolated cases against manufacturers of products in other fields. What matters to the future deserving claimant is the stark reality that unless something is done now the formerly "deep pocket" will soon be empty.

The parochial concerns that have influenced some states to allow punitive damages would justify the majority's

---

3d 654, 437 N.E. 2d 910, 913 (1982), rev'd on other grounds, 98 Ill. 2d 324, 456 N.E. 2d 131 (1983).

decision here. But it is time that some jurisdiction faces up to the realities of the situation and takes a step that might, perhaps, lead others to adopt a broader view. Courts should not wait any longer for congressional and legislative action to correct common law mistakes made by the courts. Errors created by courts can be corrected by courts without engaging in judicial activism.

I am persuaded that, at this point, it is inescapable that the resources available will be exhausted before all deserving claimants have received compensatory damages. Predictions of future events, of course, always carry some risk, but in this instance the storm warnings are too foreboding to be brushed aside. Absolute certainty likely will appear only after disaster has struck, when the time for effective anticipatory

action has vanished. If there is to be error in forecasting, I would prefer that it be in favor of redress for future claimants, rather than largesse for those who have received adequate relief.

The cruel reality underlying this case cannot be ignored. As Chief Judge Clark said in the Jackson case, "[t]his seminal case concerns much more than [an] individual claim.... We know better. Our dockets tell us so ...." 781 F.2d at 416. It is already late in the day, but we have an obligation to take what steps we can.

It should require no extended discussion to conclude that in establishing a proper priority, compensation for victims should rank first. Next must come necessary but reasonable administrative costs

attributable to compensation.[35] Far down the list - if not at the very bottom - should come punitive damages, which are by definition over and above adequate compensation. Punitive damages are an element that can equitably and easily be eliminated.

Under current conditions, it is fanciful to believe that punishment and deterrence are factors worthy of consideration in assessing priorities to limited funds. Here, punitive damages should not be recovered because their purposes are not being served and their benefits are outweighed by their costs to society. Cf. David G. Owen, The Moral Foundations of Punitive Damages. 40 Ala.

---

[35] The high transaction costs of asbestos cases that diminish the pool of available assets have been authoritatively documented. They are also a very serious problem, but that problem cannot be addressed here.

L. Rev. 705, 724-25, 737-39 (1989).[36] In the context of asbestos litigation, penalizing future claimants by awarding more than compensatory damages to early plaintiffs outweighs the asserted benefits to society of punishment and deterrence of wrongdoers.

Society's interest in protecting future claimants demands that present plaintiffs - both those who go to trial and those who settle - forego the "bonus" offered by punitive damages or a high settlement achieved by their threat.

---

[36] Professor Owen, whose endorsement of punitive damages in products liability cases has been widely cited, see David G. Owens, Punitive Damages in Products, Liability Litigation, 74 Mich. L. Rev. 1257, 1325 (1976), stated: "[O]nce the bankruptcy of the defendant manufacturer appears to be a real and imminent possibility, punitive damages should not longer be available at all." It is interesting that in a later law review article. Professor Owen substantially modified his endorsement of punitive damages and cautioned against excessive awards. See David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982).

Courts should recognize that the public interest outweighs the parochial concern in having citizens within its jurisdiction "get theirs" now. Such an approach, after all, is unjust, not only to future claimants in other parts of the country, but within the court's own jurisdiction as well. Accordingly, I would deny punitive damages in asbestos cases within the Virgin Islands.[37]

---

[37] In his dissertation prepared for the LLM program for Judges at the University of Virginia Law School, Judge Surrick concluded that punitive damages have no place in asbestos litigation. He says that balancing social and economic consequences mandates that conclusion He also referred to "judge-made doctrines" of punitive damages in asbestos litigation and says that appellate courts should rise above parochial considerations. "When the reasons for a rule no longer exist, the rule should be abolished." The Honorable R. Barclay Surrick, Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?, 87 Dick. L. Rev. 265, 301 (1983).

II.

COMPENSATORY DAMAGES

The same concerns about a limited fund in some respects must color the court's consideration of compensatory damage verdicts as well. Just as inequitable punitive damages diminish the assets available for future claimants, so do excessive compensatory awards. A sense of fairness requires that trial and appellate court reviews of jury verdicts incorporate some necessary rough equality of treatment for similarly injured individuals. Absolute equality is impossible, but in a broad range some attempt to temper aberrations is appropriate.

It is apparent that in this case the compensatory verdict of $1.3 million was grossly excessive. Recognizing that the

trial judge reduced the award, i would nevertheless reduce it somewhat further.

The plaintiff specifically disavowed any claims for present or future wage loss. Indeed, plaintiff relied on these limitations on recovery in objecting successfully to defense cross-examination about his current employment.

The extent of the plaintiff's disability was hotly contested and the expert testimony sharply conflicting. As might be expected, the medical experts disagreed on the state of the plaintiff's health. Lacking medical backgrounds, the jurors, therefore, were left to choose between the differing evaluations prepared in anticipation of trial.

There was, however, documentary evidence that was not prepared for use at the trial. It provides an appraisal of the plaintiff's health, which does not

support the idea of the extensive injury on which the jury must have rested its large award.

The plaintiff was admitted for surgeries on his knee and shoulder during the spring of 1990, approximately six months before the trial began in November of 1990. The records of the surgeon and hospital in Texas are not concerned with whether or not the plaintiff was suffering with asbestosis, but do give a revealing picture of Mr. Dunn's general health at the time.

The reports of the attending surgeon Dr. Orth described the plaintiff's athletic activities including running, rowing, swimming, and weight lifting. The physician's notes comment that "[h]e has had to give up running recently because of swelling in his left knee" and would "like to have arthroscopic

evaluation to see how the interior of his knee stood in arthritic fashion, and to determine what his future athletic activities should include."

Two months before the trial began, the doctor, in the last of his notes, said that the plaintiff had "been very busy in his work, doing a substantial amount of activities. He states that occasionally he will have to do some heavy work."

The impression gained from the rather extensive notes is of a man who was, and intends to be, more physically active than most men of his age. That picture is not one of an individual who has such a substantial injury and disability as to justify the large verdict awarded here.

When this evidence is considered along with testimony that the plaintiff

was able to work and was gainfully employed at the time of trial, and made no claim for future loss of earnings, the excessiveness of the verdict becomes clear. On the record here, it seems to me that the trial judge's reduction of the $1.3 million verdict to $500,000 was not enough. I would reduce the verdict even further to $100,000, a sum which is substantially in excess of the average jury award or settlement figure for injuries of the nature that the plaintiff claims.

I, therefore, dissent from the majority's affirmance of the judgment entered by the trial judge.

A True Copy:
Teste:

Clerk of the United States
Court of Appeals
For the Third Circuit